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No. 00-939

In the Supreme Court of the United States

JOSEPH R. GREGG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Congress lacked authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, to enact the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 226 F.3d 253. The opinion and order of the district court granting the United States summary judgment (Pet. App. 50a-76a) are reported at 32 F. Supp. 2d 151. The district court's order and preliminary injunction (C.A. App. 133-134) and related findings of fact and conclusions of law (Pet. App. 77a-107a) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 7, 2000. The petition for a writ of certiorari was filed on December 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. *Statutory Background*

1. Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-259, § 3, 108 Stat. 694 (18 U.S.C. 248), in response to a nationwide campaign of violent and obstructive interference with access to, and the provision of, reproductive health services. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). The campaign included blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. No. 306, 103d Cong., 1st Sess. 7 (1993) (H.R. Rep.). From 1977 through April 1993, more than 6000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7.

During that same period, more than 1000 acts of violence against providers of abortion services were reported in the United States. S. Rep. 3; H.R. Rep. 6. Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994) (Conf. Rep.). Providers of abortion services also received numerous death threats. S. Rep. 10. That violence endangered and injured physicians, clinic staff, and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly women who live in rural areas. *Id.* at 3, 5.

Congress found that the purpose and the effect of the obstructive and violent activities were to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to

eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the obstructive and violent conduct had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Before enactment of the Access Act, blockades and violence aimed at abortion facilities and providers had been documented in at least 28 states, the District of Columbia, and dozens of cities across the country. S. Rep. 12. Many of the activities had been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. For example, many patients travel across state lines to obtain reproductive health services, and doctors and clinic employees often travel across state lines to work. *Ibid.*

Congress found that the obstructive and violent conduct

> interfer[ed] with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

Conf. Rep. 7; see also S. Rep. 11, 14, 17, 31-32. Congress also found the pre-existing laws inadequate to prevent obstruction and violence directed at abortion facilities. S. Rep. 17, 19-21; H.R. Rep. 6, 10.

2. The Access Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * * [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services.

18 U.S.C. 248(a). The Act specifies, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

B. *Factual and Procedural Background*

1. Petitioners are individuals who were involved in various activities between August 1996 and March 1997 that blocked access to Metropolitan Medical Associates (MMA), a reproductive health services provider in Englewood, New Jersey. Pet. App. 5a.[1]

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[1] Petitioners do not include all of the originally named defendants. The parties stipulated to the dismissal of the claims against one defendant and two other defendants have died. Pet. ii; see also Pet. App. 4a n.1. In addition, only nine named defendants filed cross-appeals from the district court's ruling rejecting their Com-

In August 1996, five individuals "blocked access to MMA by placing themselves inside the clinic building on the second floor landing in front of the clinic's patient waiting room entrance and office area, completely blocking the staircase." Pet. App. 54a. The five individuals "were seated in two groups, one group of three and one group of two individuals. They had locked themselves together with U-shaped bicycle locks. The bicycle locks were placed around each of their necks and then linked together." *Ibid.* Numerous members of the police and fire departments were required to respond to the blockade. The individuals refused to unlock themselves or to leave in response to police requests. It took a considerable amount of time for fire department personnel to remove one set of locks and they were unable to remove the other set on site, requiring the removal of two of the individuals still locked together. *Ibid.* "During the blockade, access to MMA's second floor patient and office areas was completely blocked" and, at one point, two individuals moved into an open clinic doorway and had to be forcibly moved so that the door could be closed. *Id.* at 55a.

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merce Clause challenge. C.A. App. 184-185, 189. The cross-appeals were consolidated for briefing with the government's appeal from the statutory damages ruling. Gov't C.A. Br. as Cross-Appellee and Reply Br. as Appellant 1. All of the defendants were named as appellees in the government's appeal. See Pet. App. 1a. The court of appeals issued a single opinion affirming the district court and addressing all of the issues raised by all of the parties. See *id.* at 1a-49a. Therefore, the defendants who were not cross-appellants but were named as appellees in the court of appeals would be respondents in this Court under this Court's Rule 12.6.

In January 1997, twelve individuals "blocked access to MMA by sitting or lying in front of the clinic building entrance." Pet. App. 55a. The individuals "blockaded MMA despite the presence of police officers in their official vehicles directly in front of the clinic." *Ibid.* The individuals refused to leave the clinic entranceway and had to be removed by the police. *Id.* at 56a.

In March 1997, nineteen individuals again "blocked access to MMA by sitting or lying in front of the clinic building entrance." Pet. App. 56a. The blockade was conducted by two separate waves of individuals. As soon as the police removed the first group of individuals from the clinic entrance, a second wave ran from across the street to replace the first wave and also had to be removed by the police. *Id.* at 56a-57a.[2] Many individuals physically resisted their removal. *Id.* at 57a. The local police had to obtain assistance from neighboring towns and municipalities to respond to the blockade. *Id.* at 58a. At one point, the police were forced to close the street in front of MMA, a main thoroughfare, in order to respond to the situation. *Ibid.*[3]

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[2] An order issued by the Superior Court of New Jersey in 1974 requires, *inter alia*, that anti-abortion protests and demonstrators at MMA remain across the street from the clinic. Pet. App. 53a.

[3] Another blockade of MMA was attempted on April 19, 1997, the day after the instant lawsuit was filed. Despite the fact that the police erected barricades and lined the street with police vehicles, individuals ran across the street "between and over police vehicles, in an effort to get to the entrance to MMA. Some individuals threw themselves under police vehicles, suffering cuts and scrapes. One individual dove under a police van that was running and grabbed onto the underside, requiring police officers to crawl under the vehicle to pull him out." Pet. App. 58a. The police managed to apprehend the individuals before they reached the clinic entrance. *Ibid.*

2. On April 18, 1997, the United States brought the instant civil action for injunctive relief and statutory damages against petitioners and the other individuals who participated in the three blockades, alleging that each of the defendants engaged in conduct on one or more occasions that obstructed access to MMA, in violation of the Access Act, 18 U.S.C. 248(a)(1). Pet. App. 4a.

a. On July 8 through 10, 1997, the district court held an evidentiary hearing (Pet. App. 5a) and, on December 22, 1997, entered an order and preliminary injunction (C.A. App. 133-134), accompanied by findings of fact and conclusions of law (Pet. App. 77a-107a).[4] The district court held, *inter alia*, that the Access Act was a valid exercise of Congress's authority under the Commerce Clause, U.S. Const. Art. 1, § 8, Cl. 3. That holding was consistent with the ruling of every circuit court that has considered the issue. Pet. App. 87a-88a (citing cases). The court held that Congress rationally concluded that the Act "protects persons and things in interstate commerce" and "proscribes conduct that substantially affects interstate commerce." *Id.* at 88a-

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[4] The district court found the facts as summarized above and rejected the limited evidence introduced by the defendants to contradict the government's evidence regarding the three blockades. Pet. App. 98a-99a. Subsequently, in their brief in opposition to the government's summary judgment motion, the defendants stated that, "[i]n face of the videotapes and some of the uncontradicted testimony [at the preliminary injunction hearing]," they would not "spend a great deal of time in disputing the facts" pertaining to the blockades, and disputed only facts relating to the government's requests for a buffer zone and for statutory damages. *Id.* at 52a n.1. The defendants conceded, *inter alia*, that several of them "blocked the front door of the clinic" during the January and March blockades. *Id.* at 62a.

89a. The court found that the Access Act is "fundamentally different" from the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(a), that was struck down by this Court in *United States* v. *Lopez*, 514 U.S. 549 (1995). In reaching this conclusion, the court cited rulings by various circuit courts that the Access Act "regulate[s] commercial activity, the provision of reproductive health services" (Pet. App. 89a (quoting *Cheffer* v. *Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995))), "prohibits interference with a commercial activity—the provision and receipt of reproductive health services," and does not require a court to "pile inference upon inference" to find an effect on interstate commerce (*id.* at 89a-90a (quoting *United States* v. *Dinwiddie*, 76 F.3d 913, 921 (8th Cir.), cert. denied, 519 U.S. 1043 (1996), and *Lopez*, *supra*)).[5]

The district court enjoined petitioners, the other defendants, and those acting in conert with them, from "[i]n any physical way, blocking, impeding, inhibiting, interfering with, or obstructing access to" MMA; "[i]n any physical way, intimidating or attempting to intimidate anyone seeking access to" MMA; and "[e]ntering or being located on or within" the MMA premises "unless seeking reproductive health services available" from MMA. C.A. App. 134.[6]

b. On December 11, 1998, the district court entered summary judgment for the United States. Pet. App. 50a-76a. The court reaffirmed the factual findings

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[5] The district court also rejected various First Amendment challenges to the Access Act. Pet. App. 90a-94a.

[6] The district court rejected the government's proposed preliminary injunction that included a 60-foot fixed buffer zone, finding that only a more limited order was necessary to enjoin the obstructive acts that violated the Access Act. Pet. App. 107a.

underlying the preliminary injunction and held that the United States was entitled to summary judgment that petitioners and the other defendants each violated the Access Act. *Id.* at 51a-65a.

In addition, the court again rejected the United States' request for a 60-foot buffer zone, noting that no new evidence to support the request had been submitted since the time the court rejected the request at the preliminary injunction stage. Pet. App. 69a-70a. The court also rejected the United States' request that the court "impose a statutory damages award of $5000 on each defendant for each time that defendant violated" the Access Act. *Id.* at 71a. Relying on an earlier memorandum of June 18, 1998, in which it first analyzed the issue, the district court held (*id.* at 71a-73a) that the statutory damages provision of the Access Act is properly interpreted to authorize imposition of compensatory statutory damages only "in a fixed amount" per violation, "regardless of the number of individuals participating in the violation" (*id.* at 72a). Thus, the court held that petitioners and the other defendants were jointly and severally liable for $5000 in statutory damages for each of the blockades in which they participated. *Id.* at 74a.[7] The court rejected various objections by petitioners and other defendants to the imposition of statutory damages. *Id.* at 73a-74a. The district court entered an order awarding statutory damages and permanently enjoining petitioners and the

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[7] Accordingly, five defendants were held jointly and severally liable for the $5000 statutory damages award based on the August 7 blockade; 12 defendants were held jointly and severally liable for the $5000 statutory damages award based on the January 18 blockade; and 18 defendants were held jointly and severally liable for the $5000 statutory damages award based on the March 15 blockade. Pet. App. 74a-75a.

other defendants from engaging in the conduct prohibited by the preliminary injunction. *Id.* at 75a-76a.

3. The court of appeals affirmed. Pet. App. 1a-49a. The court held that the Access Act did not violate the Commerce Clause. *Id.* at 4a.[8] The court agreed with the decisions of the seven Circuits that already had considered the issue and had uniformly upheld the Access Act as a proper exercise of Congress's Commerce Clause authority. *Id.* at 16a-17a (citing cases). The court reviewed this Court's decisions in *Lopez*, *supra*, and *United States* v. *Morrison*, 529 U.S. 598 (2000) (Pet. App. 17a-18a), and held that the Access Act is a proper exercise of Congress's power "to regulate intrastate conduct that, in the aggregate, has a substantial effect on interstate commerce." *Id.* at 18a.[9] Specifically, the court of appeals analyzed each of the four considera-

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[8] The court rejected the United States' appeal from the imposition of statutory damages jointly and severally, agreeing with the district court that the statutory language and history indicate that Congress intended that the Access Act authorize imposition of statutory damages per violation, with the participants in each violation jointly and severally liable. Pet. App. 6a-14a. And the court rejected the argument by several defendants that the Attorney General lacks authority to seek statutory damages under the Access Act, holding that the statutory text and legislative history demonstrate that Congress plainly intended to authorize such an election of statutory damages by the Attorney General. *Id.* at 6a, 15a-16a. Finally, the court agreed with several other circuits that the Access Act does not violate the First Amendment. *Id.* at 30a-32a.

[9] Because of that determination, the court did not reach the United States' argument that the Access Act is also a proper exercise of Congress's authority under the Commerce Clause to regulate conduct that interferes with persons and entities engaged in interstate commerce. See Gov't C.A. Br. as Cross-Appellee and Reply Br. as Appellant 12-15; Pet. App. 18a n.3.

tions that the *Morrison* Court identified as significantly contributing to the Court's decision in *Lopez*: (1) the economic nature of the regulated activity; (2) whether the statute contains a jurisdictional element limiting the scope of the statute to activities that have an explicit connection with, or effect on, interstate commerce; (3) any congressional findings regarding the effect of the regulated activity on interstate commerce; and (4) the nexus between the regulated activity and interstate commerce. *Id.* at 18a-30a; see *Morrison*, 529 U.S. at 609-613.

First, the court of appeals held that the activity regulated by the Access Act—physical obstruction and destruction of reproductive health clinics and the intentional interference and intimidation of persons obtaining and providing reproductive health services—"is activity with an effect that is economic in nature" because it interrupts the operation of businesses that employ physicians and staff who provide goods and services to patients. Pet. App. 19a. Second, the court of appeals held that the absence of a jurisdictional element in the Access Act was not fatal because the regulated activity is directed at clinics that are, by definition, directly engaged in business. *Id.* at 21a. Third, the court noted that extensive congressional findings "derived from months of legislative hearings, research, and debate" demonstrated that the activity prohibited by the Access Act would substantially affect interstate commerce. *Ibid.* Finally, the court of appeals reviewed in detail the record before Congress and held that there was a rational basis for Congress to conclude that conduct prohibited by the Access Act has a substantial effect on the interstate market of reproductive health services. *Id.* at 21a-30a. Violence, intimidation, obstruction, and other prohibited acts cause

injury to persons who provide or seek reproductive health services, including persons who travel interstate; cause damage to facilities that purchase goods and provide services through interstate commerce; and generally interfere with the national market of reproductive health care services. *Ibid.*[10]

ARGUMENT

Petitioners contend (Pet. 11-18) that the court of appeals' decision cannot be squared with this Court's holding in *United States* v. *Morrison*, 529 U.S. 598 (2000). Petitioners embrace the reasoning of the dissent below and maintain that Congress lacked authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, to enact the Access Act, 18 U.S.C. 248.

The decision of the court of appeals rejecting petitioners' Commerce Clause argument carefully considered the factors emphasized in *Morrison*, does not conflict with any decision of this Court, and is in accord with the decision of every other circuit court of appeals that has ruled on the issue (as petitioners acknowledge (Pet. 12)). See *United States* v. *Weslin*, 156 F.3d 292,

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[10] Judge Weis dissented from the court of appeals' constitutional rulings, reasoning that the Access Act is not a valid exercise of Congress's power under the Commerce Clause to regulate activities that substantially affect interstate commerce because the regulated activity is not commercial, the Act does not contain an express jurisdictional provision, the legislative findings are inadequate, and any supposed link between the proscribed conduct and interstate commerce is too attenuated. Pet. App. 33a-46a. Judge Weis also reasoned that the Access Act cannot be sustained under the Commerce Clause as a protection of the instrumentalities of interstate commerce or persons or things in interstate commerce because it lacks any jurisdictional limitation restricting its application to activity that is demonstrably interstate commerce. *Id.* at 46a-48a.

296 (2d Cir. 1998), cert. denied, 525 U.S. 1071 (1999); *Hoffman* v. *Hunt*, 126 F.3d 575, 583-588 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); *United States* v. *Bird*, 124 F.3d 667, 672-682 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998); *Terry* v. *Reno*, 101 F.3d 1412, 1415-1418 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); *United States* v. *Soderna*, 82 F.3d 1370, 1373-1374 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); *United States* v. *Dinwiddie*, 76 F.3d 913, 919-921 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); *United States* v. *Wilson*, 73 F.3d 675, 679-688 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1519-1521 (11th Cir. 1995). Therefore, further review is not warranted.

1. Petitioners assert (Pet. 11) that the court of appeals did not follow this Court's decision in *United States* v. *Morrison*, 529 U.S. 598 (2000). In fact, however, the court below carefully and correctly applied *Morrison*.

In *Morrison*, the Court held that Congress lacked authority under the Commerce Clause to enact the federal civil remedy provision of the Violence Against Women Act (VAWA), Pub. L. No. 103-322, Tit. IV, § 40302, 108 Stat. 1941 (42 U.S.C. 13981). The Court explained that its ruling on the Commerce Clause issue was controlled by *United States* v. *Lopez*, 514 U.S. 549 (1995), and it reaffirmed the *Lopez* Court's identification of "three broad categories of activity that Congress may regulate under its commerce power"—namely channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *Morrison*, 529 U.S. at 602, 608-609. The *Morrison* Court further stated that *Lopez* "provide[d] the proper framework for conducting the required analysis" of the argument that the VAWA civil remedy provision was a valid regulation of activity

that substantially affects interstate commerce. *Id.* at 609. The Court then reviewed the four significant considerations on which the *Lopez* Court's analysis relied and concluded that VAWA's civil remedy provision did not fall within the third *Lopez* category because it (1) regulated activity that was not "in any sense of the phrase, economic activity"; (2) contained no jurisdictional element that limited the reach of the statute to conduct that has an explicit connection with or effect on interstate commerce; (3) was not based on congressional findings that adequately demonstrated that the regulated activity had a substantial effect on interstate commerce; and (4) did not regulate activity that had any substantial effect on interstate commerce. *Id.* at 613-619.

The court of appeals in the instant case correctly applied all four prongs of the *Morrison* analysis and correctly concluded that the Access Act regulates activity that has a substantial effect on interstate commerce. Pet. App. 16a-30a. With regard to the first consideration, the court held that, unlike the statute at issue in *Morrison*, the Access Act regulates "activity with an effect that is economic in nature," *i.e.*, "the physical obstruction and destruction of reproductive health clinics and the intentional interference and intimidation of persons obtaining and providing reproductive health services." *Id.* at 19a. The court emphasized that reproductive health clinics are "income-generating businesses that employ physicians and other staff to provide services and goods to their patients." *Ibid.* The court also stressed that "the primary goal of individuals and groups engaged in the misconduct prohibited by [the Access Act] is to temporarily and permanently interrupt the operations of reproductive health facilities and prevent individuals from accessing

their services." *Ibid.* The court concluded that the effect of the conduct proscribed by the Access Act "is to deter, and in some cases to stop completely, the commercial activity of providing reproductive health services." *Ibid.* Thus, the court held that the activity regulated by the Access Act, "although not motivated by commercial concerns, has an effect which is, at its essence, economic." *Id.* at 20a (citing decisions from the Second, Fourth, Eighth, and Eleventh Circuits similarly holding that the Access Act regulates activity that is directly connected to commercial activity).

The court of appeals recognized that the Access Act does not contain an express jurisdictional element as set forth in the second factor discussed in *Lopez* and *Morrison*. Pet. App. 20a. The court correctly noted that such an element is not necessary, especially where the regulated activity is directed at clinics that are uniformly engaged in business. *Id.* at 21a. With regard to the third consideration about congressional findings, the court emphasized that Congress's conclusion that the Access Act regulates activity that burdens interstate commerce was based on months of hearings, research, and debate. *Ibid.* On the final factor regarding the nexus between the regulated activity and interstate commerce, the court of appeals correctly held that the detailed congressional findings demonstrate that Congress had a rational basis for concluding that the regulated activity has a substantial effect on interstate commerce. *Ibid.*

In sum, the Third Circuit carefully and correctly applied each of the four factors identified in *Morrison* and concluded that the Access Act satisfied the requirements of *Morrison*. In reaching that conclusion, the Third Circuit joined every other circuit that has considered the issue in concluding that the Act is a valid

exercise of Congress's Commerce Clause authority. That decision does not merit further review.

2. Contrary to petitioners' suggestion (Pet. 14), nothing in *Morrison* called into question the court of appeals' conclusion that the prohibited obstructive and violent acts, which have a direct nexus and connection to economic activity, are within Congress's power to regulate. In *Morrison*, the Court did not abandon its ruling in *Lopez* that Congress's commerce power extends to activities that either "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." *Lopez*, 514 U.S. at 561.

The obstructive and violent conduct targeted by the Access Act is undoubtedly "connected with a commercial transaction." *Lopez*, 514 U.S. at 561. By prohibiting such conduct, the Act protects persons who are directly providing or obtaining a commercial service (*i.e.*, reproductive health care). The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." See *ibid.* It prohibits interference with commercial enterprises and persons who are engaging in commerce by providing or seeking reproductive health care. Unlike *Morrison* and *Lopez* where the conduct regulated by the challenged statutes and the immediate effect of that conduct were found to be noncommercial, the conduct prohibited by the Access Act is conduct that interferes with commercial transactions and has a *direct* commercial effect. Thus, there is no need to "pile inference upon inference," *Lopez*, 514 U.S. at 567, to conclude that the prohibited acts interfere with persons, things, and the provision of reproductive health services in interstate commerce, and threaten in the aggregate to eliminate, temporarily or

permanently, these services from the national commerce.

3. Petitioners assert (Pet. 14-16) that the absence of a jurisdictional element in the Access Act is fatal to the constitutionality of the Act. The Third Circuit acknowledged the absence of a jurisdictional element, but correctly concluded that the Commerce Clause does not mandate the inclusion of a jurisdictional element. Pet. App. 20a-21a. This Court has not held that such an element is a precondition for a statute to survive Commerce Clause scrutiny. A jurisdictional element is one means to ensure that a statute is applied only in those instances where there is a substantial effect on interstate commerce. If, however, there are express findings by Congress that the activities regulated by the statute have a substantial effect on interstate commerce, as here, the statute need not contain a case-by-case jurisdictional element. See *Bird*, 124 F.3d at 675; *Terry*, 101 F.3d at 1418.

4. Petitioners are in error when they contend (Pet. 16) that the legislative findings underlying the Access Act are merely a "'but-for causal chain' of logic" akin to that rejected in *Morrison* as an attempt to connect a violent, local crime "to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615. The Access Act is supported by congressional findings that specifically demonstrate that the conduct regulated by the Act substantially and directly impedes interstate commerce. As set forth above, there is ample evidence to support Congress's findings that the prohibited conduct has a substantial effect on the provision of, and accessibility to, reproductive health services in interstate commerce, see, *e.g.*, S. Rep. 14-17, and deference should be accorded those findings. See *Hodel* v.

Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).

5. Contrary to petitioners' contention (Pet. 16-18), Congress considered sufficient evidence to establish that the obstructive and violent conduct regulated by the Access Act substantially affects interstate commerce.

The congressional findings reviewed by the court of appeals demonstrate "that a national market for abortion-related services exists in this country." Pet. App. 21a. Congress found, for example, that only 17% of counties in the country have an abortion provider and, therefore, many patients must engage in interstate commerce by traveling from one State to another to obtain such services, especially in rural areas where the shortage is greatest. *Id.* at 22a-23a; see *id.* at 23a (citing congressional finding that 44% of patients at a particular clinic in Kansas are from out of state). And reproductive health clinics "employ a national market of physicians and staff," inasmuch as Congress found that there is a "shortage of physicians willing to perform abortions in the age of clinic violence" so that physicians often travel across state lines to provide abortion services. *Id.* at 23a; see *ibid.* (citing congressional finding that the only physician who performs abortions in South Dakota travels from Minnesota and provides abortion services in a total of four States).[11] The court

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[11] These findings accurately reflect the extensive testimony and evidence presented to the respective congressional committees. See, *e.g.*, *The Freedom of Access to Clinic Entrances Act of 1993: Hearing on S. 636 Before the Senate Comm. on Labor and Human Res.*, 103d Cong., 1st Sess. 59, 65 (1993) (statement of Willa Craig, Executive Director, Blue Mountain Clinic, Missoula, MT, that "[a] large number of our abortion and our prenatal patients travel an average of 120 miles to their appointments at our clinic due to lack

also cited the congressional finding that reproductive health clinics, themselves, "engage in interstate commerce," directly and indirectly, through purchases of medical supplies and products often from other States, through employment of staff, leasing of office space, and generation of income. *Id.* at 23a-24a.

The conduct regulated by the Access Act disrupts those commercial transactions. As the court of appeals concluded, the congressional findings demonstrate that "a national movement engaged in the activities proscribed by [the Act] has decreased the availability of abortion-related services in the national market and caused women seeking services and physicians providing services to travel interstate." Pet. App. 22a. Congress determined that the obstructive and violent conduct prohibited by the Access Act "inhibits and prohibits the delivery of reproductive health care services in the national market." *Id.* at 24a. Indeed, Congress found that conduct prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. See S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Numerous doctors from across the country stopped performing abortions as a result of the threats, violence, and obstructive behavior now prohibited by the Access Act. See S. Rep. 17; see also Pet. App. 24a-26a (relying on congressional findings that: obstructive and violent conduct prohibited by the Access Act has "single goal of eliminating the practice of abortion by closing abortion

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of services in their own areas. These areas include Idaho, eastern Washington, Wyoming and Canada.").

clinics;" conduct was succeeding because it had led to death, injury, harassment, and denial of access to abortion to thousands of women nationwide; clinics had closed and provision of medical services had been delayed, increasing health risks to patients; millions of dollars of damage had been caused to clinics by blockades thereby eliminating services on a temporary or permanent basis; physicians had been intimidated into ceasing provision of abortion services). Also, the disruption at reproductive health clinics eliminated, on a temporary or permanent basis, not only abortion services but also other health services provided by such facilities. See S. Rep. 14; H.R. Rep. 8-9. Thus, there is a direct, causal connection between the acts prohibited by the Access Act and the availability and provision of reproductive health services in interstate commerce.

Moreover, as the court of appeals correctly noted, the Access Act does not merely regulate intrastate activity that, in the aggregate, has an effect on interstate commerce. The obstructive and violent conduct regulated is national in scope and is often organized and directed across state lines, creating a "truly national problem." Pet. App. 26a. Accordingly, the court correctly held that the Access Act "has a substantial effect on the interstate commerce of reproductive health services." *Id.* at 22a.

6. Petitioners argue (Pet. 16-17) that the Access Act is not a valid exercise of federal authority because the conduct could be regulated by local law enforcement authorities. The Access Act, however, involves a national solution to a national problem. The Act does not create a general police power or intrude upon areas "of traditional state concern." See *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). The Act seeks to regulate activity that has a direct effect on interstate

commerce.[12] As discussed above, the conduct prohibited by the Access Act has a direct effect on, and clear nexus to, the availability and accessibility of a commercial service in a national market. A blockade or violence directed at a clinic or person affiliated with a reproductive health facility (whether a physician, employee, or patient) can temporarily or permanently disrupt the provision of or access to such services.

Moreover, unlike most violent crimes that are local in nature, the obstructive and violent activities prohibited by the Access Act were found by Congress to be national in scope. Congress recognized that many activities, including blockades, are the result of a nationally coordinated effort and "have been organized and directed across State lines" to reduce the availability of and hinder accessibility to the national market for reproductive health services. S. Rep. 13.[13] Thus, unlike

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[12] The Access Act specifically provides that: "[n]othing in this section shall be construed— * * * to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies." 18 U.S.C. 248(d)(3).

[13] Indeed, several defendants admitted below that they have been defendants in cases in other jurisdictions involving obstruction or similar conduct at clinics providing reproductive health services. See Gov't Memo. in Supp. of Summ. Jdgmt. Mot. 15-17 & nn.10 & 11; see, *e.g.*, *United States* v. *McDaniel*, 175 F.3d 1009 (2d Cir.) (Table) (unpublished opinion available at 1999 WL 177275) (affirming injunctive relief for obstructing access to New York City clinic in violation of Access Act entered against Ruby McDaniel, Joseph Gregg, Joseph O'Hara, Francis Pagnanelli, and William Raiser), cert. denied, 528 U.S. 963 (1999); *United States* v. *Roach*, 947 F. Supp. 872, 878 (E.D. Pa. 1996) (injunctive relief for obstructing access to Pennsylvania clinic and for violating Access Act entered against Joseph Roach, Kevin Blake, Amy Bois-

Morrison where the question was whether violent, intrastate activity, in the aggregate, had a substantial effect on interstate commerce, here the prohibited activity is national in scope and has a direct and substantial effect on interstate commerce. Pet. App. 26a.[14]

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soneault, Sheryl Fitzpatrick, Dennis Green, Joseph F. O'Hara, Katharine O'Keefe, William C. Raiser, and James Trott).

[14] The Access Act also is a valid exercise of Congress's authority under the Commerce Clause to regulate conduct that interferes with persons and entities engaged in interstate commerce—another category of Commerce Clause authority expressly reaffirmed in *Lopez* and *Morrison*. An entity is engaged in interstate commerce "when it is itself 'directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.'" *United States* v. *Robertson*, 514 U.S. 669, 672 (1995) (citation omitted). Congress reasonably concluded that reproductive health clinics that provide abortion services and the individuals associated with such clinics directly engage in the acquisition and distribution of goods and services in interstate commerce. The Seventh and Eighth Circuits have recognized the validity of the Access Act under this aspect of Congress's Commerce Clause authority. See *Soderna*, 82 F.3d at 1373 (the Access Act is "a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines"); *Dinwiddie*, 76 F.3d at 919-920 (Access Act properly regulates persons and things in interstate commerce). Cf. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 333 (1991) (conspiracy to deny a physician "access to the market for ophthalmological services provided by general hospitals in Los Angeles has a sufficient nexus with interstate commerce to support federal jurisdiction" under the Sherman Act, 15 U.S.C. 1 *et seq.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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